INDEX

	Page
Introduction	1
Interest of the Associated Builders and Contractors	2
The Facts	3
The Issues	5
Summary of Argument	5
Argument	6
1. Frouge Corporation a Secondary Object of the Union	7
2. Legislative History Fails to Support Board's "Control" Theory	13
3. Legislative History Similarly Fails to Support Board's Theory Regarding Section 8(e)	14
4. The "Preservation of Work"	14
5. NLRB is Inconsistent	18
6. Boycott Study Shows Board Theory Could Validate Most Secondary Boycotts	20
7. Practical Effects of Legalizing Product Boycotts	21
(A) Would Overturn Past Decisions Preserving Competition and Curbing Monopoly	21
(B) NLRB's Position Hurts Small Business and its Employees	25
(C) The Board Would Hinder Technological Progress	27
(D) Uneconomic Methods Would Harm Public	28
Conclusion	29

AUTHORITIES CITED

Cases

Allen Bradley v. *Local Union No. 3, IBEW*, 325 U.S. 797 (1945) 21, 22, 24

Cardinal Industries and Carpenters, 136 NLRB 977 (1962) 15

Page

Carpenters Union v. *NLRB (Sand Door)*, 357 U.S. 93 (1958) 7

Denver Building Trades Council v. *NLRB*, 341 U.S. 675 (1951) 12

Joliet Contractors Assn. v. *NLRB*, 193 F2d 833 (C.A. 7, 1952); enforced, 202 F2d 606 (1953); cert. denied 346 U.S. 824 (1953) 8, 14, 23

International Rice Milling v. *NLRB*, 183 F2d 21; (C.A. 5, 1950); 341 U.S. 665 (1951) 8, 9

National Woodwork Manufacturers Assn. v. *NLRB et al*, 139 NLRB No. 65 (1964); 352 F2d 594 (C.A. 7, 1965) 4, 5, 16

Sheet Metal Workers Local 28 & Johnson Service Co., 156 NLRB No. 79 (1966) 18

United Brotherhood of Carpenters & Wadsworth Building Co., 81 NLRB 802 (1949) 20

Washington-Oregon Weavers' Council (Sound Shingle) 101 NLRB No. 23 (1952); 211 F2d 149 (C.A. 9, 1954) 11

Statutes:

National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 USC (151 et seq) 4, 5, 6, 13-18, 22, 29

Miscellaneous:

"Automation, the Impact of Technological Change", American Enterprise Association, (1963) 27

93 Congressional Record 7690 26

45 Cornell Law Quarterly (1960) 15

"The Impact of Technological Change", the W.E. Upjohn Institute for Employment Research, (1963) 27

12 Labor Law Journal 397 (May, 1961) 21

Legislative History of the Labor-Management Relations Act of 1947 18

Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, Vol. 2 ..... 11, 13, 15

Senate Report No. 105, 80th Cong., 1st Session 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 110

NATIONAL WOODWORK MANUFACTURERS ASSN., ET AL.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 111

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NATIONAL WOODWORK MANUFACTURERS ASSN., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE

INTRODUCTION

This brief *amicus curiae* is submitted by the Associated Builders and Contractors, Inc., of Baltimore, Maryland,

with the consent of the parties, pursuant to Rule 42(2) of the Supreme Court Rules.

INTEREST OF THE ASSOCIATED BUILDERS AND CONTRACTORS

The Associated Builders and Contractors, incorporated under the laws of Maryland, has its principal office in Baltimore. Among its regional chapters is one in the Philadelphia area, the site of the dispute herein. The Association has more than 1,500 members and affiliated firms with an estimated 80,000 employees in eight states. Over 350 of these members are in the Philadelphia area where the instant case originated. There are associate members in a ninth state.

The membership consists principally of contractors, subcontractors, suppliers of building products and related types of business. Generally, the membership is in the category of "small business."

The Association is greatly concerned that the principles of competition be protected by law. It is concerned about the instant case because it fears a possible ruling that would promote monopoly to the special detriment of small and medium-sized contractors and their suppliers.

Among the membership are both employers whose employees are organized into unions and those who are not. For this reason its membership should be distinguished from that in associations where practically the entire membership has employees who are organized. Because of this membership situation, it is deeply concerned that the decision to be rendered should balance these considerations and take into account the best interests of both groups.

A major purpose of this Association is the promotion of good will and confidence among builders and contractors and the public. To this end it stands for efficiency and urges adherence to ethical standards.

In pursuit of these objectives it studies and encourages the use of sound labor relations programs and practices. Its members, therefore, are concerned with legislation and administrative and court decisions that affect these programs and practices. Hence, it recognizes the importance of this case, and on behalf of its members it respectfully seeks consideration of the arguments it propounds in this brief.

THE FACTS

The ban by the Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein at times called the Union, which is comprised of 27 local carpenter unions in Philadelphia and in four other counties in the area, on installing prefabricated doors at four large construction projects is responsible for this cause coming before the Court.

The boycott of the factory fabricated doors stems from the Union's enforcement of Rule 17 of its by-laws which prohibits members of the District Council from handling doors from a mill that has fitted or fabricated them prior to their arrival at the construction site. The facts are outlined but briefly here because they are set forth fully by the litigants and by the Circuit Court.

The Union's product boycott action occurred in 1963 when it banned 170 factory-finished architectural doors for a hospital in Coatesville, 235 doors destined for the North Junior High School, 182 doors purchased for the St. Aloysius Academy, and 3,600 doors factory-machined by Mohawk Flush Doors, Inc., of South Bend, Ind., and Sunbury, Pa., scheduled for installation at a naval Capehart housing project. All locations are in the Philadelphia area.

The National Labor Relations Board and the U. S. Court of Appeals for the Seventh Circuit held that the Union's refusal to handle the doors in three of the four projects was an unfair labor practice under the National Labor-Management Relations Act, finding it to be an illegal secondary boycott. In the three projects the construction specifications required prefabricated doors. In the fourth project known as the Capehart housing job, prefabricated doors were not required by the specifications nor the construction contract. The general contractor, the Frouge Corporation, herein at times called Frouge, was left free to select the product. Accordingly, this general contractor ordered pre-cut doors from a factory in Pennsylvania.

In deciding that there was no secondary boycott when the Union instructed its members not to hang the doors contractor Frouge ordered for the naval housing project, the National Labor Relations Board, at times herein called the NLRB, introduced a new theory as to whether a product boycott was made unlawful by the statute. It held that because the specifications for Frouge's job did not require prefabricated doors, therefore, the choice of the product was left with Frouge. When this contractor selected a factory door, a so-called Mohawk pre-cut door, the union's dispute, says the NLRB, was with Frouge as a primary party. No secondary party was involved. The NLRB contended that the Union's target was Frouge, not the prefabricated doors; thus, it concluded there was only a lawful primary boycott—not an illegal secondary boycott.[1] The Court of Appeals accepted this theory and affirmed the Board's decision that there was no violation of Section 8(b)(4)(B), but reversed the Board's finding that there had been no violation of Section 8(e) and of Section 8(b)(4)(A).

---

[1] National Woodwork Manufacturers Assn., 139 NLRB No. 65 (1964); CCH NLRB 13,555.

THE ISSUES

An issue before the Court, accordingly, is whether a product boycott of a particular item is valid under Section 8(b)(4)(B) whenever the contractor is free under his agreement with the owner either to purchase a product in question prefabricated at a factory or to have it processed by workers on the site. The NLRB urges that it is unfair labor practice for a union to refuse to handle a prefabricated product when it is ordered by the owner, but that it is *not unfair* when the contractor is free to order a prefabricated product or not. The Association filing this brief, herein at times called *Amicus*, contends the NLRB is in error.

A second issue before the Court is whether under Section 8(b)(4)(A) and Section 8(e) a union's alleged motive in seeking to preserve work for its members validates an agreement at the jobsite to boycott prefabricated items in instances where there is no dispute with the producer. The NLRB holds such an agreement under the described circumstances to be no violation. The Circuit Court disagreed with the NLRB on this point.[2] *Amicus* urges in support of the ruling by the Circuit Court that Congress intended no such discrimination between various classes of workmen as results from the Board decision, and that "preservation of work" as a motive does not excuse, justify, or legalize a jobsite agreement to restrict and interfere with freedom to purchase products manufactured by other producers elsewhere.

SUMMARY OF ARGUMENT

In its argument *Amicus* contends, contrary to the NLRB, that the Frouge Corporation was a secondary not a primary object of the Union's refusal to install pre-cut

---

[2] *National Woodwork Manufacturers Assn.* v. *NLRB*, 352 F2d 594 (C.A. 7, 1965)

doors, and that the Labor Board's novel "control" theory and the Board's reasoning on the new Section 8(e) are not supported by the legislative history of the Act. The inconsistencies of the NLRB also are pointed out, citing a 1966 Board decision holding that the so-called preservation of work is not an excuse for refusing to install a product; yet, the Board in the instant case relies on the preservation of work to approve the Union's refusal to install prefabricated doors.

Amicus argues the practical effects of legalizing product boycotts, showing that this would overturn past decisions which preserve competition and curb monopoly. *Amicus* also argues that the NLRB's position would be of greatest harm to the employees of small business, and that if allowed to stand the NLRB theory would hinder needed technological progress and result in uneconomic methods harmful to the general public.

ARGUMENT

The Court of Appeals affirmed the finding of the Board that the Union's refusal to hang the doors at the Naval Capehart housing project was a primary strike against Frouge, the general contractor, and that Frouge was not a secondary target. *Amicus* submits this finding was erroneous, contending that Frouge was the secondary target and a tool by which the Union sought to suppress the use of pre-cut doors throughout the area. Thus the Union's action was an illegal secondary boycott, and not a primary strike to be considered within the proviso of Section 8(b)(4)(B) of the statute.

The terms "primary" and "secondary" are not found in Section 8(b)(4), but are descriptive terms of legal writers and students who seek a method of explaining union coercion against innocent third parties in labor disputes.

After disposing of the Frouge case, the Court of Appeals, supporting the NLRB, proceeded to consider the findings in the three other cases. A violation was found because in the three remaining cases pre-cut doors were ordered by the owners and were not the choice of the contractors as in the Frouge boycott.

The legislative history of the Labor-Management Relations Act in 1947 and 1959 amendments offer no indication whatsoever that such a distinction should now be created. The reason urged, "protecting our work," finds no support either in the legislative history or in the clear language of the Act. "Most relevant, of course, is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate."[3]

1. Frouge Corporation a Secondary Object of the Union

The Court of Appeals for the Seventh Circuit accepts the NLRB holding that the Union's refusal to hang 3,600 factory-machined doors made by Mohawk Flush Doors, Inc. was a primary strike against Frouge, the general contractor.

The NLRB and the Court of Appeals reached this conclusion by a rather strange path of reasoning that conveniently overlooks the primary target of the Union's refusal to work. That target is the door manufacturer, Mohawk, and not the contractor, a secondary target, who merely installs or hangs doors. If Frouge, the general contractor, were the Union's real adversary, it would refuse to perform any and all work for him. By selectively declining to perform only when a particular product, which the union finds objectionable, is to be used, it is obvious that it is the door company, not the installing agent upon whom the union applies its economic pressure.

---

[3] *Carpenters' Union* v. *NLRB* (Sand Door), 357 U.S. 93, 100 (1958).

Frouge, the contractor, is the usual innocent third-party secondary boycott victim. He certainly is not the Union target.

Fourteen years ago the NLRB took the same position in the Joliet Contractors case it takes here. The Court of Appeals at that time clearly saw the Board's error. Said the Court:

> "Its target is not directed at general contractors separately, as the Board argues, but at all business—general contractors, subcontractors, and dealers in material and supplies. More specifically, it is directed at the use of preglazed material in the building and construction industry in the Joliet area." [4]

In the Court's consideration of the case on the merits it again reemphasized that the activities were not primary:

> "Both the Board and the union, so we think, place too much emphasis upon the contention that the activities of the union and its members were primary and, therefore, permissible under the Act. . . . Whatever merit there may be in the premise upon which this argument is predicated, the fact remains that the target was the use of preglazed sash, and any and all who handled, used or sold such sash were the intended and in many cases the actual victims of the union's course. Moreover, we are not convinced that a union violation of the provision under discussion is dependent upon whether its activities are primary or secondary." [5]

The Court of Appeals then cited the Fifth Circuit's opinion in Rice Milling Co., 183 F.2d 21, 26 (1950), which states:

---

[4] *Joliet Contractors Assn. et al* v. *NLRB*, 193 F2d 833-839 (C.A. 7, 1952)

[5] *Joliet Contractors Assn. et al* v. *NLRB*, 202 F2d 606-610 (1953)

> "The statute clearly provides a remedy for the type of conduct engaged in by the union, without resort to any distinction between primary and secondary activities. If the union's activities come within the language of the statute, they constitute an unfair labor practice, regardless of whether they might have been considered a true 'secondary boycott' under the old common law or under any of the modern and popular theories."

The Supreme Court in 1951 reversed the International Rice Milling decision of the Fifth Circuit on other grounds but, as explained by the Seventh Circuit in the Joliet opinion, the Supreme Court "did not do so by distinguishing between primary and secondary activities. . . . 341 U. S. 665."

The mere fact that the contract for the government's naval Capehart housing project in the Philadelphia area did not specify pre-cut doors, but left the choice of doors to the contractor, in no way supports the conclusion that the refusal to hang the doors was only a primary dispute with Frouge. In three other jobs in the area, the NLRB and the Court of Appeals found a secondary boycott unfair practice because the construction contract called for the use of pre-cut doors.

Rule 17 on which the union bases its conduct clearly shows that the door manufacturer, not a contractor, is the Union target, as was the finding in the other three situations. This item in the union's by-laws specifically identifies the door manufacturer, not the installer, as the target:

> "No member of this District Council will handle material *coming from a mill* where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, *nor any doors* or transoms which have been fitted prior to being furnished on the job. . . ." (Emphasis supplied.)

The Union itself clearly uses the words, "coming from a mill" and "any doors."

The opinion of the Court of Appeals quotes Union Business Manager Gray in a letter of February, 1963, to the president of the United Brotherhood of Carpenters "stating that there was a serious problem of pre-cut and prefitted doors coming into the Philadelphia area."

When the Union then imposed a secondary boycott on pre-cut doors, Gray told a vice president of the L. F. Driscoll Co., another general contractor, that "no carpenters from now on will hang pre-finished or pre-fit doors."

How plain can it be that the Union's primary target is the pre-cut doors and that the installing contractors really are the secondary victim?

There is no logic to the NLRB's twisted reasoning that because a type of product is specified by the builder or owner, a union may not refuse to work for the construction contractor, but that it may refuse if the builder or owner leaves the choice of the product to the construction contractor.

An earlier NLRB decision rightly refused to accept a Carpenter's union contention that a secondary employer did not exist in a situation where the union refused to process Canadian-made shingles because they lacked a Carpenter union label. The attempt to consider this a primary boycott was brushed aside, with the Board explaining:

> "It is true that in the usual type of secondary boycott there is a dispute with one employer followed by secondary activity against another employer with whom he has business dealings to force a cessation of business with the primary employer. *But because this kind of secondary boycott is more usual or more frequent does not mean that it is the only kind Congress intended to reach.*

> "We do not believe that, as to the type of conduct now before us, Section 8(b)(4)(A) contemplates the existence of an active dispute over specific demands, between the union and the producer of the goods under union interdict. The legislative history surrounding the enactment of Section 8(b)(4)(A), while difficult as a guide in many respects does furnish reasonably clear guidance on the precise issue here. The Senate Committee Report on this section indicates that *no demand upon the producer of the boycotted produce is necessary to sustain the charge that a union has engaged in the type of 'secondary boycott'* we have here under consideration."[6] (Emphasis supplied)

The fallacious reasoning of the present NLRB in calling the Union's conduct a primary boycott is shown by the fact that even congressional opponents of corrective secondary boycott legislation define secondary activity as the kind that perfectly fits the facts in the Frouge Philadelphia boycott.

After the House passed H. R. 8400, the Landrum-Griffin bill, on August 14, 1959, Rep. Frank Thompson of New Jersey, one of the leading opponents of the bill, urged in an analysis of the bill which he joined in presenting to the House that the Committee bill would permit common situs picketing at construction sites. In urging a provision to prohibit it he indicated what he deemed to be the intent of the bill with respect to prefabricated products when he said:

> "All true secondary boycotts in the construction industry would continue to be unlawful, *such as the refusal to erect prefabricated houses* . . ." (Emphasis supplied)[7]

---

[6] Washington-Oregon Weavers Council (Sound Shingle) 101 NLRB 1159 (1952); aff'd 211 F2d 319 (C.A. 9, 1961)

[7] Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, Vol. 2., p. 1577

In this connection it is significant that there is no Carpenter strike at Mohawk Flush Doors, the target of the product boycott in this case, because Mohawk's employees are not represented by the Metropolitan Philadelphia Council of Carpenters' union, but Mohawk is the primary employer because it is Mohawk that makes the doors that the Philadelphia Carpenters' union find objectionable. The only way the Union could achieve its objective, moreover, was to compel Frouge to cease doing business (purchasing and using doors) with Mohawk. This was an inevitable and necessary result if the union was to succeed. That it may have had some other objective also is immaterial, as was pointed out by the Supreme Court in the landmark Denver Building & Construction Trade council case, 341 U. S. 675, 689, (1951). The Court stated:

> "It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section."

Still another statement in the legislative history of the Landrum-Griffin Act shows it was designed to stop all secondary boycotts and not permit the existence of technical loopholes. Rep. Griffin of Michigan, a co-author of the law, in explaining how his bill would replace the mild corrective proposals of the House Education and Labor Committee's bill, said:

> "Our substitute would ban all hot cargo agreements. Mr. Chairman, I have difficulty understanding the position of those who support the committee bill. They seem to recognize evils of the secondary boycott and its relationship to corruption and racketeering but then they refuse to support amendments which are designed to close technical loopholes. Are they not in the position of saying that they are against a secondary boycott if it happens to be accomplished in one way—but it will be all right if it is

accomplished through one of the technical loopholes in the law?" [8]

The Board and the Circuit Court are, thus Amicus submits, in error, in holding that Frouge, the contractor, is the primary target of the Carpenters. Frouge is a secondary target—merely a vehicle to permit the union to surreptitiously keep pre-cut doors off the market, put the Mohawk Flush Door Company out of business and Mohawk's employees out of work.

2. Legislative History Fails to Support Board's "Control" Theory

Some of the legislative history has been quoted above in showing that Frouge was in fact a secondary boycott victim. Nowhere in the legislative history of the Act or in its amendments is there a distinction made on the basis of "control" of the product to be installed. There is no qualification or exception based on the freedom of the contractor to have the product fabricated on or off the site as he may elect. This construction of Section 8(b)(4)(B) by the NLRB is a complete departure from the intent of Congress.

Rep. John Rhodes of Arizona, a former member of the House Education and Labor Committee, explained the intent of the 1959 amendments in a House floor speech August 11, 1959.[9] He declared:

> "Section 705 of this bill, which deals with the secondary boycott . . . is drawn to deal with these abuses in an effective manner. Subsection (a) of Section 705 contemplates a sweeping revision of Section 8(b)(4) of the present Labor Relations Act. It closes the loopholes which have enabled labor organizations to engage in some types of boycotts with complete immunity . . ."

---

[8] Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, Vol. 2, p. 1568

[9] Ibid. p. 1581

3. Legislative History Similarly Fails to Support Board's Theory Regarding Section 8(e)

Rep. Rhodes on the above occasion also pointed out that the new legislation struck down insistence by unions on having contract clauses which would approve refusal to handle prefabricated products. He stated:

> "The addition of the words 'to agree' in this paragraph, as the substitute proposes, would make it illegal for unions to insist upon hot cargo clauses being inserted into collective bargaining agreements. This would accomplish a much needed reform. At the present time not only do most Teamster contracts contain such clauses, but *various building and printing trade unions have insisted on contracts under which employees are excused from handling certain prefabricated products* . . . Were it not for the immunity granted labor organizations from the antitrust laws the courts would undoubtedly have invalidated such contracts as being flagrant restraints of trade." (Emphasis supplied)

The legislative history is clear that a demand for a hot cargo clause such as Rule 17 of the union's by-laws or coercion to enforce such an agreement is an unfair labor practice under Sections 8(b)(4)(A) and 8(e).

4. The "Preservation of Work"

It is obvious that the intent of Congress was to stop construction unions from refusing to handle prefabricated products. The loophole created by the NLRB and based on preservation of jobsite work has no support either in the language itself or in the legislative history.

A statement in the legislative history by Rep. Kearns, ranking minority member of the House Education and Labor Committee, substantiates this point. Refuting a statement by Senator McNamara on the use of prefabricated materials, Rep. Kearns declared:

"As in the common situs picketing problem, it was the location of the work that we had in mind, and as a reasonable compromise, we provided that the agreement (reference is to Section 8(e) agreements) must relate to work actually done at the site. Work done or products manufactured, processed, fabricated, and so forth by another employer away from the construction site could not be subject to a hot cargo agreement. *It was not intended to restrict an employer's freedom to do business or purchase from any other person and to decide in what form the product or materials shall arrive on the job.* Furthermore, to interpret the proviso to cover any work or product which could be done at the site would permit restrictions on the installation of many other products besides prefabricated pipe which arrive on the job in prefabricated form. This certainly was not in my mind . . .

"It seems clear to me, therefore, that an *employer even in the construction industry, retains the freedom to choose how the products or materials he utilizes shall arrive on the job—prefabricated or not*—and that such freedom cannot be restricted by agreements with labor organizations." [10] (Emphasis supplied)

The Board has expressly supported this view of Rep. Kearns.[11]

The Cornell Law Quarterly likewise has supported it.[12] The only purpose of the construction proviso, it explains, was to alleviate the difficulties which arise when union and nonunion men are forced to work side by side. The article states:

". . . it is absolutely clear that agreements which restrict the general contractor in purchasing, using

---

[10] Ibid, p. 1961

[11] *Cardinal Industries*, 136 NLRB 977, 988 (1962)

[12] 45 Cornell Law Quarterly, 724, 1753 (1960)

or installing products manufactured or supplied by another person who does not work at the jobsite, merely because that person is deemed 'unfair' by the union, are not protected by the proviso to Section 8(e)."

Any mention that work preservation as a motive validates what would otherwise be a violation of Section 8(b)(4)(A) and Section 8(e) is lacking from this comprehensive discussion of the subject.

The Circuit Court quite properly, *Amicus* urges, reversed the holding of the Board and its trial examiner that there was no violation of Sections 8(b)(4)(A) and 8(e) on the ground that "Rule 17 is a lawful work-protection or work-preservation provision." In its reversal of the Board on this point, the Court did not accept the argument about work-protection or work-preservation, but referred to the proviso and said: "The legislative history shows that it was explained by Senator Kennedy that the 'proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite.'" [13]

The NLRB and its trial examiner accept the statement of Robert Gray, Secretary-Treasurer of the Carpenters District Council that, "The District Council's objection was not aimed at the pre-cut or pre-fit millwork but was solely directed at the loss of the cutting out and fitting work which would otherwise be performed by the jobsite carpenters." The unionist said he was protecting his carpenters from being deprived of work and wages which rightfully belonged to them.

This same union work argument was rejected in the Joliet Contractors case where pre-glazed sash was sought to be boycotted from the market on the theory that this would preserve work. The Court of Appeals, after find-

---

[13] *Natl. Woodwork Manufacturers Assn.* v. *NLRB*, 352 F2d 594 (C.A. 7, 1965)

ing that the NLRB and the union placed too much emphasis upon the contention that the union's activities were primary, added:

> "Closely allied with this contention is the argument that the union was engaged in the rightful endeavor to obtain more work for its members by preventing the use of pre-glazed sash on the job." [14]

The NLRB does not cite legal authority which rightfully guarantees that only the jobsite carpenters should cut and hang doors. The effect of its decision is to establish a new rule supporting the union's contention that it as a private organization has a legal right to forcefully monopolize work at the expense of others.

The very language of the original Section 8(b)(4)(A) of Taft-Hartley, which later became 8(b)(4)(B) in the Landrum-Griffin amendments, refutes a work preservation theory.

Any attempt by the NLRB to read such a result into the law is a patent distortion of both language and congressional intent.

The legislative history of the National Labor-Management Relations Act, however, does not accept this type of union discrimination. The NLRB ignores this legislative history and its sanction of a product boycott to protect the work of the jobsite carpenters deprives others of their livelihood. Rep. Gerald W. Landis of Indiana discussed this very point during the debate which led to the adoption of the 1947-Taft-Hartley Act. He declared:

> "Secondary boycotts engaged in by labor unions to force a third party not a party to a primary labor dispute, to force that party to cease using the products of the employer, engaged in the pri-

---

[14] *Joliet Contractors Assn. et al* v. *NLRB*, 202 F2d 606, 610 (C.A. 7, 1953).

> mary dispute is an activity which should be made illegal. *Secondary boycotts have had the effect of throwing a great many innocent people out of work.*" (Emphasis supplied).[15]

The NLRB would, therefore, create good and bad secondary boycotts, depending upon the number of men put out of work.

The often-quoted remarks of Senator Taft of April 29, 1947, in a colloquy with Senator Pepper covers this point. Senator Taft said:

> "It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our Committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." [16]

Thus the co-author of the Taft-Hartley Act made no exception for "work protection" exemptions as the NLRB now wishes to do.

5. NLRB is Inconsistent

The NLRB in a decision January 14, 1966, appears to have reversed its holding in National Woodwork Manufacturers. In the January decision [17] involving the Johnson Service Company and the Sheet Metal Workers Union, the Board appeared to hold that the preservation of work is not an excuse for refusing to install a product.

The facts are similar to the present case, except that dampers, instead of pre-cut doors were the product. The

---

[15] Leg. Hist., Natl. Labor-Management Rel. Act. 1947, p. 583

[16] Leg. Hist., Natl. Labor-Management Rel. Act. 1947, p. 1106.

[17] *Sheet Metal Workers Local 28 and Johnson Service Co.*, 156 NLRB No. 79 (1966).

Johnson Service Co. makes dampers and air flow equipment in its Milwaukee plant. Kerby Saunders, Inc., is a New York City subcontractor installing air conditioning equipment. When Kerby ordered Johnson dampers, Local 28 of the International Sheet Metal Workers union threatened to pull its men off the project if the Johnson dampers were used. In order to prevent a work stoppage, Kerby and other employers agreed to substitute dampers made by Local 28 members, instead of the Johnson products made in Milwaukee.

The union contended that its labor contract permitted it to refuse to install the Johnson dampers, and relied upon the clause: "Fabricated items to be manufactured by a contractor having a signed agreement with Local 28."

The trial examiner and the NLRB found a violation of Section 8(e) and Sections 8(b)(4)(A) and (B).

> "The Examiner," said the Board, "stated that clauses which prohibit an employer from using the products of an employer who does not have a contract with the union are presumed to be unlawful. The clause is not a valid work preservation clause since it could be construed to prohibit a signatory employer from doing business with any other employer except one whose employees are represented by Local 28.
>
> "The Examiner found that the union violated Section 8(b)(4)(A) by threatening a work stoppage at the construction site in order to force Kerby and the other employers to abide by the terms of the invalid 'hot cargo' clause. The union's conduct also violated Section 8(b)(4)(B) since it has as its object the forcing of Kerby and the other employer to cease doing business with Johnson, the primary employer."

In the case herein, the facts are parallel. Mohawk, the door manufacturer, did not have a contract with the Philadelphia Carpenter's Council. Johnson, the damper manufacturer, did not have a contract with Local 28.

Kerby, the contractor prescribed the use of Johnson dampers, and the NLRB found an unfair labor practice. Frouge prescribed the use of Mohawk pre-cut doors, and the NLRB refused to find an unfair labor practice.

In its earlier years, the NLRB's opinion in the *Wadsworth Building Co.* case,[18] made it clear that any and all attempts to accomplish a secondary boycott, no matter by what activity, are prohibited. The Board said:

> "Moreover, it can hardly be supposed that Congress, in enacting Section 8(b)(4) as the legislative response to the asserted evils of secondary boycotts, did not envisage the whole gamut of union activities by which such boycotts are achieved."

Continuing, the Board reiterated its belief:

> "As indicated previously, Section 8(b)(4)(A), was aimed at eliminating all secondary boycotts and their concomitant activities which Congress thought were unmitigated evils and burdensome to commerce . . . .
>
> "It was the objective of the unions' secondary activities, as legislative history shows, and not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision."

6. Boycott Study Shows Board Theory Could Validate Most Secondary Boycotts

A statistical study of union secondary boycotts between 1947 and 1958 indicates that to adopt work preservation as a valid ground for a secondary boycott would legalize most of them. The study, "Secondary Boycotts in the United States Since 1947," by Paul A. Brinker, professor of economics at the University of Oklahoma, and one of

---

[18] *United Brotherhood of Carpenters et al and Wadsworth Building Co.*, 81 NLRB 802 (1949)

his assistants, (12 Labor Law Journal 397, May 1961), revealed that:

42 per cent were for organizational purposes
14 per cent were for jurisdictional purposes
18 per cent were to promote union or closed shop

All of these purposes obviously are related to obtaining or holding work for union members. Only the remaining 26 per cent of secondary boycotts during this period were on account of labor disputes. Hence, if protection of work is to be a ground for validating secondary boycotts the great majority of them would by this sort of spurious reasoning be validated. The facts are that what happens in such a case is that the work to be done is transferred from non-union to union hands or vice versa. Since freedom of choice is at the basis of our national labor policy it is reasonable to assume that Congress intended no such favoritism as that produced by the Board decision.

7. Practical Effects of Legalizing Product Boycotts

(A) *Would overturn past decisions preserving competition and curbing monopoly*

Even before the Taft-Hartley and Landrum-Griffin amendments to the National Labor Relations Act, the Court in the 1945 Allen Bradley decision 325 U. S. 797 (1945) limited the use of the product boycott technique to effect a monopoly.

The Union in that case used both threats and peaceful coercion to achieve a boycott of electrical fixtures which had been assembled by its members. As the "dynamic force" it brought manufacturers and repair people into submission one by one until it finally had a virtually complete monopoly in the New York area. The Court held this activity of union-employer collaboration to be a violation of the Sherman Act, observing that the "primary

objective of all antitrust legislation has been to preserve business competition and to proscribe business monopoly."

There was discussion of the Allen Bradley decision when Congress considered the Taft-Hartley legislation. The practices of Local 3 in monopolizing the privilege of assembling all electrical equipment in the New York City area were specifically condemned. The Senate Committee report explaining Section 8(b)(4)(A) (now covered by Section 8(b)(4)(B) in the 1959 amendments) said:

> "This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organizations other than Local No. 3." [19]

The result was that the amendments enacted at the time tightened the ban imposed by that decision and wrote rules into labor legislation which made such conduct as that of Local 3 illegal even when the union did not collaborate with employers in such conduct.

The finding in this present case by the Board and the Court of Appeals would go far toward destroying the principles laid down both in the Allen Bradley decision and in the Taft-Hartley and Landrum-Griffin amendments.

It would jeopardize the basic principle behind anti-trust legislation to preserve business competition and to proscribe business monopoly. It would definitely jeopardize the clear mandate of Congress in what is now Section 8(b)(4)(B) of the Act when it enacted the Taft-Hartley amendments which proscribe refusal to handle the products "of any other producer."

---

[19] Senate Report No. 105, 80th Cong., 1st Session, p. 22; 1 Leg. Hist. 428.

The Union seeks a result which would allow unions to whipsaw all contractors one by one until prefabricated doors and all other prefabricated building materials would be forced off the market, thereby limiting the public's freedom of choice in construction products.

If the NLRB's view is upheld, the result would be a step back to the restrictive practice product boycott days before the Joliet Contractor's decision. The Court of Appeals in setting aside the NLRB's holding described union monopoly power of that era:[20]

> "Long prior to the enactment of the amended Act of 1947, the union did not permit any of its members to work on projects that used preglazed building materials. . . .
>
> "The union rules against preglazed building material have been enforced in the City of Chicago for many years, with the result that such materials are not used in the area. It was not until 1947, however, that the union attempted to enforce its boycott rules in the Joliet construction area."

Under the Board's view in this case, the City of Philadelphia would become another Chicago of the 1940s—prefabricated materials would be kept from the public market—a restrictive practice the Congress in 1947 sought to eradicate.

The "control" and "preservation of work" theories of the Board would be the vehicle which would effect such results. Powerful unions would inevitably bring pressure on employers to avoid contracts which stipulated the use of prefabricated products. The unions in turn would be free under the Board rule to boycott such products in the name of work-preservation. The end result would be a stifling of competition and a monopoly of the work by the

---

[20] *Joliet Contractors Assn.*, 193 F2d 833 at 835, 838 (C.A. 7, 1952)

building trades unions. The contractor would be helpless to ascertain what fabricator would do certain work most reasonably or indeed whether some fabricator would do it for less than it could be done by workmen on the site. There would be no choice. He would of necessity have it done on the site or face union trouble.

A corollary of all this is that architects would hesitate to stipulate prefabricated materials in building specifications. They would in instances be under direct union pressure not to do so. They would always be under indirect pressure to avoid such stipulations for the reason that they would realize the building trades unions would at all times be demanding that contractors avoid agreements with such stipulations.

The same inexcusable methods and the same problem prevail in the case before the Court as were present in the Allen Bradley situation. The purpose of the Union is to monopolize for its own members the cutting work on doors that are to be installed. It would like for employers to agree, but if they do not agree, the Union seeks freedom to use coercion to achieve its goal. If granted, it could enlist the support of employers one by one until the monopoly would at last be complete as in the Allen Bradley case. Rule 17 can have no purpose except control of all door cutting for the benefit of union members. The seeds of an even larger monopoly than that struck down in the Allen Bradley case are present in the instant case because a larger union membership is involved in the case of the Carpenters.

The use of both the antitrust principle and our labor laws to preserve business competition and prevent monopoly abuses should be safeguarded. The public interest would suffer a disservice if the Board by indirection were to overthrow the proscription in monopoly abuses effected through these laws.

(B) *NLRB's position hurts small business and its employees*

The small contractors are the ones most likely to become victims of the Board rule. Operating on a small scale, they are likely to do business informally. Their agreements with owners are likely to be informal. Hence, they are less likely than large contractors to operate under agreements which specify whether doors are to be cut on the site or obtained already cut to specifications. This "control" by the contractor, which is a basic test under the Board decision, would inure to the detriment of small contractors because of this tendency on their part to have informal arrangements. They would be the ones the rule of the Board would lay open to union pressure to have such work as the cutting of doors done on the site. Since doing such work on the site may be uneconomic, the small contractor could suffer great injury when confronted with such a requirement. His very smallness would make these too high costs an exceedingly serious consequence and could at times even force him out of business.

The big contractors, moreover, would almost surely have better counsel than the small contractors. That way they would receive advice to have their contracts with owners specify the use of pre-cut doors or other prefabricated products when their use would be advantageous. Under the Board's "control" theory they would by such contract provisions avoid uneconomic results that come on account of it.

The large contractors would have a further advantage through the greater number of problems about which they could bargain with the Union. The numerous matters regarding which they deal place them in a better position to trade this for that. They would thus be able to make deals with the Union no small contractor could make for the simple reason that the latter would have no *quid pro quo* with which to trade.

As the Union would come to understanding after understanding with large contractors, there inevitably would be a desire on the part of these employers and the Union to eliminate competing small contractors. Holding them to the uneconomic procedure of doing a maximum amount of work on the site would be one method of elimination. Even if the small contractor's employees were not organized, the union would seem to have valid grounds under the Board theory for picketing his construction operation to protest failure to have fabricating work done on the site. The picketing would appear to be for a lawful object.

Senator Taft, in the original debates which led to the adoption of 1947 statute, saw how the small employer would be driven out of business by product boycotts. On the Senate floor June 23, 1947, Senator Taft declared:

> "In this bill we prohibit secondary boycotts all over this country. *There have been secondary boycotts in which a union has said, 'We will not handle the goods of a manufacturer X because we do not like the men who make his particular goods'*; and in many cases where a manufacturer had a union certified to him—perhaps a CIO union—the AFL union has boycotted it, or vice versa. All over the country such things have occurred; and *I know that in my own state, small manufacturers have absolutely been driven out of their business and have been destroyed by unions far off from their concern, unions in which they had no interest whatsoever.* Yet the strikes have dragged on. We have tried to prohibit secondary boycotts, and we give the Board the power to decide the controversies."[21] (Emphasis supplied.)

But nearly 20 years later, we find the Board seeking avenues to avoid this responsibility to halt the type of union activity that is aimed at small business.

---

[21] 93 Congressional Record, pp. 7690-1

(C) *The Board would hinder technological progress*

A most disconcerting result of the Board rule would be that it places a brake on changed methods of building which are for the good of the economy. The Board in essence adopted the principle in the instant case that a refusal to handle pre-cut doors was legitimate for the reason that the union members had customarily done the cutting out and fitting work. The Board observed that Rule 17, under which the union members refused to do such work, was designed to guard against encroachments on the cutting out and fitting work—that the refusal was in order to protect a legitimate economic interest of employees by preserving their unit work.

If this reasoning is followed to its legitimate conclusion, it can be a bar to technological progress. Suppose the workmen on a construction site, for example, refused to use ready-mixed cement on the ground that at one time the employees on the site did all the mixing. Suppose the same employees refused to install a composition floor on the ground that at one time the employees on the site cut all the lumber that went into the floor and installed it. Suppose the painters refused to work on a building because some neon signs are to be installed, arguing that originally all sign work was done by painters.[23]

Who is to say what materials should be used or by what methods they should be installed? Left to the results of the market place, the search inevitably will be for the most economic method of doing the work. The Board approach, however, bars reliance on the established laws of economics.

---

[23] "Automation, the Impact of Technological Change", American Enterprise Association, Washington, D.C. (1963); "The Impact of Technological Change", the W.E. Upjohn Institute for Employment Research, Kalamazoo, Mich., (1963).

(D) *Uneconomic Methods Would Harm Public*

To approve the principle urged by the National Labor Relations Board would be costly to the consuming public. A contractor who bids on a project of necessity looks for ways to do the job most economically. If he finds that it will cost less to buy certain plumbing fixtures already assembled than to assemble them on the premises he is naturally going to buy them already assembled. If pre-glazed sash are more economical than sash work done on the site, he will use pre-glazed sash. If factory assembled electrical materials and fixtures are more economical than those assembled on the site he will use the factory assembled products. The Board principle, however, would allow the union to coerce the contractor into having such work done on the site except as to those installations where the latter was bound by agreement with the owner to have them prefabricated.

Under this proposed license to be granted unions to engage in such a boycott, the contractor would as a result not be free to use the most economical installations. His consideration would have to be the avoidance of union trouble. The cost in itself would become a secondary consideration. The good business practice of shopping for the best deal would give way to favoring the deal least likely to cause union trouble. The public would be the real loser. It would be forced to pay for uneconomic installations in the form of higher building costs.

The contractor even in those instances where he has "control" should be left free to select any prefabricated materials of his choice or to have the work done on the site, handling the matter whichever way he decides is most efficient. Denial to him of this opportunity is a clear impediment to the working of our competitive enterprise system .

CONCLUSION

Amicus respectfully submits to this Court that the refusal of a labor organization to permit its members to handle or work upon a specific product when the selection of that product is made by a contractor rather than by the owner or architect, is a violation of the National Labor-Management Relations Act. In short, the so-called "control" theory created by the NLRB to permit a union to keep a product off the market should not be considered an exception to the secondary boycott prohibitions of the Act.

Amicus also submits to this Court that the motive of preserving work for members of a labor organization does not validate the refusal to handle or install prefabricated materials or products at sites of construction under Section 8(b)(4)(A) and 8(e).

Amicus asks:

(1) That the Court reverse the NLRB and the Court of Appeals, and rule under the facts of this case that the conduct of the Union in its dealing with Frouge was a violation of Section 8(b)(4)(B) of the Act.

(2) That the Court reverse the NLRB and affirm the Court of Appeals that the said conduct of the Union in its dealings with Frouge violated Section 8(b)(4)(A) and Section 8(e) of the Act.

(3) That the case be remanded with directions to enter judgment accordingly.

Respectfully submitted,

WILLIAM B. BARTON,
General Counsel

HARRY J. LAMBETH
Attorney
806 - 15th St., N. W.
Washington, D. C.

Attorneys for
ASSOCIATED BUILDERS AND CONTRACTORS, INC.

September 7, 1966.

ANK

AGE